

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GLORIA J. LARKIN and U.S. POSTAL SERVICE,
POST OFFICE, Shreveport, LA

*Docket No. 98-920; Submitted on the Record;
Issued November 8, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a) on the grounds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

On April 14, 1993 appellant, then a 42-year-old casual mail processor, filed a notice of occupational disease alleging that she suffered carpal tunnel syndrome as a result of her federal employment.

On April 19, 1993 Dr. Michael T. Acurio, appellant's treating physician and a Board-certified orthopedic surgeon, released appellant to full duty.

On June 16, 1995 the Office accepted appellant's claim for bilateral carpal tunnel syndrome.

By decision dated October 30, 1995, the Office ordered that appellant's claim for compensation be rejected because the medical evidence failed to establish any injury-related disability for the period May 7, 1993 through September 21, 1995.

Pursuant to appellant's request, a hearing was held on July 23, 1996. Appellant stated that she returned to work in April 1993 only to be eligible for continued employment at the employing establishment. She stated that Dr. Acurio only released her to full duty for that reason.

On August 13, 1996 the employing establishment indicated that appellant never had an opportunity to receive full-time employment.

By decision dated September 26, 1996, the Office hearing representative found that the evidence was not sufficient to establish that appellant had disability causally related to her

accepted work injury, beginning May 7, 1993 and continuing. The Office noted that the opinion of Dr. Stephen J. Ramey, a Board-certified plastic surgeon, was speculative and not rationalized. It therefore found that appellant failed to meet her burden of establishing disability causally related to her employment injury.

In a letter dated September 27, 1996, the Office advised appellant that a request for reconsideration must be made no later than one year following the date of the decision.

On October 2, 1997 appellant's representative requested reconsideration. In support, appellant's representative submitted correspondence from a Social Security Administration administrative law judge indicating that he was investigating appellant's claim for disability benefits. The representative also submitted interrogatories from a vocational expert indicating that appellant was not employable. The representative also submitted a June 11, 1997 letter from the Office authorizing surgery in the form of a bilateral carpal tunnel release. Finally, he submitted a June 13, 1997 letter from Dr. Ramey indicating only that appellant required surgery.

By decision dated October 31, 1997, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and that it did not establish clear evidence of error.

The Board finds that the Office did not abuse its discretion in refusing to reopen appellant's case for merit review under section 8128(a) on the grounds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.¹ Inasmuch as appellant filed his appeal with the Board on February 2, 1998, the only decision properly before the Board is the Office's October 31, 1997 decision denying appellant's request for a review of the merits of its September 26, 1996 decision.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,² a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.³ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁴ When a claimant fails to meet one of the above standards, it is a

¹ *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

² 5 U.S.C. §§ 8101-8193.

³ *Thankamma Mathews*, 44 ECAB 788 (1993); 20 C.F.R. § 10.138(b)(1)-(2).

⁴ 20 C.F.R. § 10.138(b)(2).

matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.⁵

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Act. The Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁶ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a).⁷

In this case, the Office properly determined that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to a reconsideration within one year accompanies any subsequent merit decision on the issues.⁸ The Office issued its last merit decision in this case on September 26, 1996 wherein the hearing representative affirmed the Office's October 30, 1995 decision finding that appellant failed to establish a disability causally related to her accepted work injury, beginning May 7, 1993 and continuing. Appellant's request for reconsideration, however, was dated October 2, 1997 and it was not received by the Office until October 8, 1997. Inasmuch as appellant's request for reconsideration was made outside the one-year time limitation, the Board finds that it was untimely filed. Moreover, the Office specifically informed appellant in its September 27, 1996 letter that a request for reconsideration must be made no later than one year following the date of the decision.

In those cases where a request for reconsideration is not timely filed, the Board has held, however, that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.⁹ Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.¹⁰

⁵ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

⁶ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); 20 C.F.R. § 10.138(b)(2).

⁷ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁸ *Larry L. Lilton*, 44 ECAB 243 (1992).

⁹ *Gregory Griffin*, *supra* note 6.

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602, para. 3b (January 1990) (the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office); *Thankamma Mathews*, *supra* note 3; *Jesus D. Sanchez*, *supra* note 7.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹¹ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹² Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹³ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁴

In support of her request for reconsideration, appellant's representative submitted correspondence from a Social Security Administration administrative law judge indicating that he was considering appellant's claim for disability benefits. This evidence failed to address whether appellant suffered any disability due to his accepted injury. Moreover, a decision by this administrative law judge that appellant was disabled under the Social Security Act would have no evidentiary value under the Federal Employees' Compensation Act.¹⁵ Appellant's representative also submitted interrogatories from a vocational expert indicating that appellant was not employable. The determination of whether an employee is physically capable of performing a job is a medical question that must be resolved by a medical expert.¹⁶ Inasmuch as the vocational expert is not a physician within the meaning of the Act, this report fails to constitute competent medical evidence and is insufficient to show clear evidence of error. Moreover, the Office's June 11, 1997 letter authorizing surgery is not relevant to the issue of appellant's disability. Finally, appellant submitted a report from Dr. Ramey, a Board-certified plastic surgeon. Dr. Ramey's June 13, 1997 letter, however, failed to address whether appellant was disabled due to her accepted injuries. Accordingly, this report also fails to demonstrate clear evidence of error.

Inasmuch as the evidence submitted by appellant in support of his request for reconsideration is not manifest on its face that the Office hearing representative committed error in the September 26, 1996 decision, the Office did not abuse its discretion by refusing to reopen appellant's claim for a merit review under section 8128(a) of the Act on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

¹¹ *Dean D. Beets*, 43 ECAB 1153 (1992).

¹² *Leona N. Travis*, 43 ECAB 227 (1991).

¹³ *Jesus D. Sanchez*, *supra* note 7.

¹⁴ *Leona N. Travis*, *supra* note 12.

¹⁵ *Daniel Deparini*, 47 ECAB 657 (1993).

¹⁶ *John E. Lemker*, 45 ECAB 258 (1993).

The October 31, 1997 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.
November 8, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

Bradley T. Knott
Alternate Member